Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya, Zainal Abidin bin Azim & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–22 OF 2004 (B)
STEVE SHIM CJ (SABAH & SARAWAK), PS GILL AND ALAUDDIN FCJJ
7 MARCH 2005

Election — Petition — Application for declaration that elections were null and void — Non compliance with written law in conduct of election — Burden of proof — Whether non compliance must affect result of election — Election Offences Act 1954 s 32(b)

In the election for the Selangor state constituency of N17 Gombak Setia in 2004, the third respondent was declared to be the returned candidate with a majority of 2,728 votes over the appellant. The appellant who was the oppossing candidate filed the Election Petition ('EP') to challenge the legality and the validity of the election. The appellant sought for a declaration that the election was void and that the third respondent had not been duly elected or ought not to have been returned pursuant to s 35(a) and (b) of the Election Offences Act 1954 ('EOA'). In support of the EP the appellant sets out three grounds, namely: (1) the extension of the voting period from 5pm to 7pm in contravention of reg 11(5) and 23 of the Elections (Conduct of Election) Regulations 1981 ('ECOER'); (2) the respondents failed to comply with reg 14A of the ECOER which relates to the use of an authoritative text of electoral rolls; and (3) such non-compliance affected the result of the election (s 32(b) EOA). The learned judge ruled that, even though there were clear and blatant non-compliances with the written law relating to the conduct of the election, the appellant failed to satisfy that such non-compliances affected the result of the election. Therefore, the EP brought by the appellant was dismissed with costs.

The legal issue in this case was whether the judge had erred in law in his interpretation of s 32(b) EOA 1954 when he held that the onus was on the appellant to prove to the satisfaction of the election judge that: (1) there had been non-compliance with the provisions of the election laws; and (2) that such non-compliance had affected the result of the elections. The factual issue was whether on the facts of the case, the appellant had proved that there had been non-compliance with regs 11(5), 14A, 23 and Form 8 ECOER and that such non-compliance had affected the result of the elections.

Held, dismissing the appeal with costs:

Section 32(b) EOA clearly places the burden on the appellant to prove to the satisfaction of the election judge that: (1) there has been non-compliance with the provisions of the written law relating to the conduct of the elections; and (2) the said non-compliance has affected the result of the elections (see para 20). The two limbs in s 32(b) are to be read conjunctively and not disjunctively (see para 21). The onus is on the petitioner to prove to the satisfaction of the

election judge that there is non-compliance with the provisions of any written law relating to election and that such non-compliance affects the result of the election (see para 27). Lord Denning's approach in the case of *Morgan v Simpson* [1974] 3 All ER 722 — which read the English equivalent section disjunctively, to wit 'the court can still declare the election void even if the irregularities do not affect the outcome of the election' — cannot be applied here as our s 32(b) on which the appellant's petition was based is crystal clear in its language. To accept such an interpretation would defeat Parliament's intention in enacting s 32(b) (see para 38); *Morgan v Simpson* [1974] 3 All ER 722 not followed. Therefore, to avoid the election on ground (b) ie of non-compliance with the relevant law, it must be proved that there was not only non-compliance but also that such non-compliance had affected the result of the election (see para 61); *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 followed.

[**Bahasa Malaysia summary**

Dalam satu pilihan raya bagi Negeri Selangor kawasan pilihan raya N17 Gombak Setia pada tahun 2004, responden ketiga telah diisytiharkan sebagai calon pilihan raya yang di lapor pilih dengan undian majoriti sebanyak 2,728 undi lebih daripada perayu. Perayu yang merupakan calon pembangkang telah memfailkan satu Petisyen Pilihan Raya ('Petisyen itu') untuk mencabar kesahihan dan kesahan pilihan raya tersebut. Perayu telah membuat permohonan untuk deklarasi bahawa pilihan raya tersebut adalah tidak sah dan responden ketiga tidak dipilih dengan sewajarnya atau tidak sepatunya kembali sebagai calon yang di lapor pilih menurut s 35(a) dan (b) Akta Kesalahan Pilihan Raya 1954 ('AKPR'). Perayu telah menyatakan tiga alasan menyokong Petisyen, iaitu: (1) lanjutan masa bagi tempoh pengundian dari 5ptg hingga 7ptg telah melanggar per 11(5) dan 23 Peraturan-peraturan Pilihan Raya (Penjalanan Pilihan Raya) 1981 ('PPR'); (2) responden-responden gagal mematuhi per 14A PPR mengenai penggunaan naskhah sahih daftar pemilih; dan (3) ketidakpatuhan ini telah menjejas keputusan pilihan raya tersebut. Hakim memutuskan bahawa walaupun jelas terdapat perlanggaran undang-undang perjalanan pilihan raya, perayu gagal memuaskan bahawa ketidakpatuhan ini menjejas keputusan pilihan raya. Oleh sebab itu, Petisyen yang difailkan oleh perayu ditolak dengan kos.

Persoalan perundangan yang perlu ditentukan dalam adalah sama ada hakim salah di segi undang-undang dalam tafsiran s 32(b) apabila memutuskan bahawa beban adalah pada perayu untuk membuktikan mengikut kepuasan hakim pilihan raya bahawa: (1) terdapat ketidakpatuhan dengan peruntukan undang-undang pilihan raya; dan (2) ketidakpatuhan itu menjejas keputusan pilihan raya. Persoalan fakta adalah sama ada atas fakta kes ini, perayu telah membuktikan bahawa terdapat ketidakpatuhan dengan per 11(5), 14A, 23 dan Borang 8 PPR dan ketidakpatuhan ini telah menjejas keputusan pilihan raya tersebut.

Diputuskan, menolak rayuan itu dengan kos:

Seksyen 32(b) jelas meletakkan beban pada perayu untuk membuktikan mengikut kepuasan hakim pilihan raya bahawa: (1) telah berlaku ketidakpatuhan dengan peruntukan undang-undang tertulis mengenai perjalanan pilihan raya; dan (2) ketidakpatuhan itu telah menjejas keputusan pilihan raya tersebut (lihat perenggan 20). Kedua-dua cabang dalam s 32(b) hendaklah dibaca secara bersama dan bukan berasingan (lihat perenggan 21). Beban adalah pada pempetisyen untuk membuktikan mengikut kepuasan hakim pilihan raya bahawa terdapat ketidakpatuhan dengan peruntukan undang-undang tertulis mengenai perjalanan pilihan raya dan ketidakpatuhan ini telah menjejas keputusan pilihan raya (lihat perenggan 27). Pendekatan Lord Denning dalam kes *Morgan v Smith* [1974 3 All ER 722 — dalam seksyen setara di England dibaca secara berasingan iaitu 'mahkamah masih boleh mengisytiharkan pilihan raya itu tidak sah walaupun ketidakpatuhan tidak menjejaskan keputusan pilihan raya' — tidak boleh diguna pakai atas s 32(b) yang menjadi dasar Petisyen perayu, kerana peruntukan adalah jelas dan terang. Penggunaan tafsiran ini akan menentang niat parlimen menggubal s 32(b) (lihat perenggan 38); *Morgan v Simpson* [1974] 3 All ER 722 tidak diikut. Maka, untuk mengelak pilihan raya atas sebab cabang (b) iaitu ketidakpatuhan dengan undang-undang yang releven, ia mesti di buktikan bahawa terdapat ketidakpatuhan kepada peruntukan undang-undang dan ketidakpatuhan itu telah menjejas keputusan pilihan raya (lihat perenggan 61); *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 1 CLJ 729 diikut.]

Notes

For cases on election petition, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1521–1559.

Cases referred to

Abd Hamed bin Mamat lwn Uz Baharuddin bin Mohd dan lain-lain [1992] MLJU 83 (refd)
Ang Thye Chin v Chua Kow @ Chua Kow Eng & lain-lain [1996] 1 CLJ 49 (refd)
Bong Geok Beng v Ahmad Nordin bin Mohamed Amin [1980] 1 MLJ 167 (refd)
Cheah Seng Teik, Re Election Petition of [1958] MLJ 275 (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69 (refd)
Chong Thain Vun v Watson & Anor and other cases [1968] 1 MLJ 65 (refd)
Dr Lee Chong Meng v Abdul Rahman bin Hj Abdullah, Returning Officer & Ors [2000] 6 MLJ 98 (refd)
Foo Loke Ying & Anor v Television Broadcast Ltd & Ors [1985] 2 MLJ 35 (refd)
Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729 (folld)
Harris Mohd Salleh v Ismail bin Majin, Returning Officer Ismail bin Majin & Ors [2001] 3 MLJ 433 (refd)
Home Luck Investments Sdn Bhd v Commissioner of Federal Capital of Kuala Lumpur [1969] 1 MLJ 248 (refd)
Isahak Hamid v Mustapha [1965] 2 MLJ 18 (refd)

Mohamed Jaafar v Sulaiman & Anor [1970] 1 MLJ 18 (refd)
Morgan v Simpson [1974] 3 All ER 722 (not folld)
Norbert Choong Kai Choong & Anor v Mohamed Idris bin Haji Ibrahim & Anor [1980] 1 MLJ 316 (refd)
Patau Rubis v Patrick Uren & Anor [1984] 2 CLJ (Rep) 348 (refd)
Rhina Bhar @ Rani Raj Pal v Karpal Singh a/l Ram Singh & Ors [1995] MLJU 123 (refd)
Tanjung Puteri Johore State Election Petition, Re [1988] 2 MLJ 111 (refd)
Tg Nawawi bin Tengku Abd Kadir @ T Putra v Lokman bin Muda & lain-lain [1996] 1 CLJ 551 (refd)

Legislation referred to

Election Offences (Amendment) Act 2003
Election Offences Act 1954 ss 32(b), 35(a), (b), 36A
Elections (Conduct of Election) Regulations 1981 reg 11(5), 14A, 23, Form 8
Evidence Act 1950 s 114(g)
Representation of the People Act 1949 s 37(1) [Eng]

Tuan Haji Ariff Mohd Yusof (M Reza Hassan, Zulqarnain Lukman, Abdullah Abd Karim, Ahmad Lutfi Awang, Md Firdaus Zakaria, Fazaruddin Sujairi, Md Khairuddin Hj Othman and Hj Othman Md Noor with him) (Radzi & Abdullah) for the appellant.
Umi Kalthum Majid (Azizah Nawawi and Ilmani Mohamad with her) (Senior Federal Counsel) (Attorney General's Chambers) for the first and second respondent.
Dato' Muhammad Shafee Abdullah (Azhar Azizan Harun and Kaushalya Rajathurai with him) (Shafee & Co) for the third respondent.

Alauddin FCJ (delivering judgment of the court):

[1] This is an appeal from the decision of the election judge which was delivered on 6 September 2004. The appeal was filed by the appellant (petitioner in the High Court), Dato' Ismail bin Kamus, who was a duly nominated candidate for PAS to contest the election for the Selangor state constituency of N17 Gombak Setia in the eleventh general election. The election was held on 21March 2004. The respondents to this appeal are the returning officer (first respondent), the suruhanjaya pilihan raya (second respondent) and the returned candidate (third respondent).

[2] In the said election, the third respondent, as a candidate for Barisan Nasional was declared to be the returned candidate with a majority of 2,728 votes over the appellant.

[3] The appellant then filed the election petition ('EP') on 27 April 2004 to challenge the legality and the validity of the said election.

[4] The relief which the appellant was seeking in the said EP was for a declaration that the said election for the state constituency of N17 Gombak Setia which was held on 21 March 2004, was void and that the third respondent

had not been duly elected or ought not to have been returned pursuant to s35(a) and (b) of the Election Offences Act 1954 ('EOA').

[5] Parties have agreed that the outcome of this appeal, ie Rayuan Sivil No 01–22–2004 (B) which concerns the state seat of Gombak Setia (N17) will bind Rayuan Sivil No 01–23–2004 (B) which concerns the Parliament seat of Gombak (P98).

[6] In support of the EP the appellant sets out three grounds, namely:

(a) The extension of the voting period from 5pm to 7pm in contravention of reg 11(5) and 23 of the Elections (Conduct of Election) Regulations 1981 ('ECOER') was illegal and therefore the said election was not conducted in accordance with the principles laid down in the election laws and that such non-compliance affected the result of the election.

(b) That the respondents failed to comply with Regulation 14A of the ECOER which relates to the use of an authoritative text of electoral rolls. In the said election, different electoral rolls were used; and

(c) The abovementioned violations had caused the election not to have been carried out in accordance with the principles laid down in any written law relating to the conduct of any election, and that such non-compliance affected the result of the election (s 32(b) EOA).

[7] At the outset of the hearing, the allegations of fact that the time for polling was extended beyond the gazetted time for two hours and that the different electoral rolls were used, were not in dispute. The same position was maintained before us in this appeal.

[8] The learned judge gave his decision on 6 September 2004. In his written judgment, His Lordship ruled that, even though there were clear and blatant non-compliances with the written law relating to the conduct of the election, the appellant failed to satisfy that such non-compliances affected the result of the election. Therefore, the EP brought by the appellant was dismissed with costs.

[9] On 16 September 2004 the appellant filed this appeal to this honourable court pursuant to s 36A of the EOA, which had been inserted recently vide Election Offences (Amendment) Act 2003.

[10] The memorandum of appeal sets out 25 grounds of appeal. However, before us learned counsel for the appellant was content to confine his submission on the following grounds only which he said reflected the 25 grounds.

[11] Firstly, learned counsel submitted that the learned election judge failed to address his mind to the overriding purpose of laws relating to elections, and chose to adopt a narrow and technical reading of s 32(b). The learned

election judge therefore failed to give due emphasis to the overriding principles of democracy and the need to protect the purity of the election process. Election laws should be read as rejecting illegal and/or fraudulent practices so that the political and constitutional rights of the citizens of Malaysia can be protected.

[12] This honourable court as the highest court in the land was respectfully urged to eschew a narrow and highly technical reading of s 32(b), and approve a distinct line of case-law authority in Malaysia (exemplified by the case of *ReTanjung Puteri Johore State Election Petition* [1988] 2 MLJ 111) as well as in many parts of the Commonwealth which have adopted the constitutionally correct approach as stated in the English case of *Morgan v Simpson* [1974] 3 All ER 722.

[13] Apart from *Tanjung Puteri* the other cases that follow the principle in *Morgan v Simpson* are *Abd Hamed bin Mamat lwn Uz Baharuddin bin Mohd dan lain-lain* [1992] MLJU 83 and *Harris Mohd Salleh v Ismail bin Majin, Returning Officer Ismail bin Majin & Ors* [2001] 3 MLJ 433. We were urged to consciously apply and enlarge the principles in these cases.

[14] Secondly, learned counsel for the appellant submitted on the issue of burden and standard of proof. It was argued that the burden on the appellant is a slight one and the existence of the term 'appears' in s 32(b) EGA lends force to this submission. The appellant had discharged that burden of proof. Once the appellant has succeeded in establishing a breach and effect on the election result, the burden shifts to the respondents and if the respondents fail to call witnesses to rebut, an adverse inference under s 114(g) of the Evidence Act can be drawn against the respondents.

[15] Thirdly, learned counsel's submission focused on the issue of interpretation of s 32(b) EOA. He argued that whilst it is true that election courts have, in general, interpreted the laws concerning election strictly, the cases on this issue relate more to questions of procedure. In other words, a literal and rigid interpretation is adopted in cases concerning procedural non-compliances. In these cases, the petition is usually struck out at the preliminary stage on the basis of non-compliance with the provisions of the election laws. He cited the following cases, ie *Dr Lee Chong Meng v Abdul Rahman bin Hj Abdullah, Returning Officer & Ors* [2000] 6 MLJ 98, *Bong Geok Beng v Ahmad Nordin bin Mohamed Amin* [1980] 1 MLJ 167, *Chong Thain Vun v Watson & Anor and other cases* [1968] 1 MLJ 65, *Norbert Choong Kai Choong & Anor v Mohamed Idris bin Haji Ibrahim & Anor* [1980] 1 MLJ 316, *Patau Rubis v Patrick Uren & Anor* [1984] 2 CLJ (Rep) 348 and *Rhina Bhar @ Rani Raj Pal v Karpal Singh a/l Ram Singh & Ors* [1995] MLJU 123.

[16] Counsel further contended that since the respondents in this appeal had conceded that there were breaches of the election laws, an equally rigid and literal mode of interpretation of s 32(b) should not be applied.

[17] The last and concluding submission of learned counsel for the appellant dealt with the broad and detailed issues of evidence that have appeared in this case. It was argued that the learned judge has failed to apply the correct burden and standard of proof. Further it was said that, the learned judge has failed to draw the proper and correct inferences from the evidence tendered by the 24 witnesses for the appellant. The learned judge should have accepted the unchallenged evidence of the appellant as the only relevant evidence before him since the material evidence of breaches of the law was admitted by all respondents.

[18] To put it shortly, both the learned senior federal counsel for the first and second respondents and learned counsel for the third respondent submitted that the learned judge was correct in law and fact when His Lordship decided that the appellant must prove that the non-compliance of the election laws affected the result of the election under s 32(b) EOA.

[19] For the purpose of this appeal we propose to deal with the issues raised in two aspects, ie the legal issue and the factual issue. The legal issue deals with the question whether the judge had erred in law in his interpretation of s 32(b) EOA 1954 when he held that the onus was on the appellant to prove to the satisfaction of the election judge that: (i) there had been non- compliance with the provisions of the election laws; and (ii) that such non-compliance had affected the result of the elections. The factual issue will address the question whether on the facts of the case, the appellant had proved that there had been non-compliance with regs 11(5), 14A, 23 and Form 8 ECOER and that such non-compliance had affected the result of the elections.

[20] We shall now begin with the legal issue. It is common ground that the EP was grounded on s 32(b) EOA which reads as follows:

> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the election judge:
>
> (a) that…
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election.

[21] The provision clearly places the burden on the appellant to prove to the satisfaction of the election judge that:

(i) there has been non-compliance with the provisions of the written law relating to the conduct of the elections; and

(ii) the said non-compliance has affected the result of the elections.

[22] There is no doubt in our minds that the two (2) limbs in s 32 (b) are to be read conjunctively and not disjunctively. There is no dearth of authorities to support such interpretation. **A**

[23] In *Re Election Petition of Cheah Seng Teik* [1958] MLJ 275, Rigby J held as follows (at p 277): **B**

> The only remaining subsection available to the petitioner for the purposes of this petition is s 32(b). That subsection provides that the election of a candidate may be declared void on an election petition for 'non-compliance with the provisions of any written law relating to any election, if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election'. **C**
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> It is to be noted that mere non-compliance with the provisions of such written law is not, by itself, sufficient to avoid the election; the non-compliance must have affected the result of the election.

[24] In *Isahak Hamid v Mustapha* [1965] 2 MLJ 18, it was held by Ismail Khan J (as he then was) at p 19: **D**

> lt is clear that the ground stated in the petition for the relief claimed brings it within the ambit of s 32(b) of the Ordinance. To succeed, however, the petitioner has to establish that not only was there a non-compliance with the provisions of the section, but that because of such non-compliance the election was not conducted according to the principles of such election law and further that such non-compliance has affected the result of the election. **E**

[25] The same interpretation was adopted by Chang Min Tat J (as he then was) in *Mohamed Jaafar v Sulaiman & Anor* [1970] 1 MLJ 18, wherein his Lordship said (at p 19): **F**

> On a proper interpretation, regulation 31 read together with s 32(b) of the Act clearly establishes that non-compliance either with the provisions of any written law relating to any elections or with any of the regulations relating to elections is per se not fatal unless the election has not been conducted in accordance with the principles laid down in such law and such non-compliance affect the results of the election. **G**
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> Before an election court can declare any election void for reasons of non-compliance with the provisions either of any written law or of any regulations relating to elections, it must be satisfied, among other things, that the failure of compliance affects the results of the election. **H**

[26] Dealing with the same issue in the case of *Tg Nawawi bin Tengku Abd Kadir @ T Putra v Lokman bin Muda & lain-lain* [1996] 1 CLJ 551, Abdul Hamid Mohamed J (as he then was) had this to say at p 561: **I**

> Kedua-dua belah pihak menghabiskan banyak masa berhujah mengenai s 32(b) ini. Maka saya akan membincangnya sekarang. Berkenaan seksyen ini terdapat penghakiman-penghakiman Hakim-Hakim Pilihan raya di Malaysia yang mengatakan bahawa adalah

menjadi tanggungjawab pempetisyen untuk membuktikan dengan memuaskan hati Hakim Pilihan raya bahawa terdapat ketidakpatuhan peruntukan-peruntukan mana-mana undang-undang bertulis berhubungan dengan sesuatu pilihan raya dan ketidakpatutan itu telah menyentuh keputusan pilihan raya itu: lihat *Muip bin Tabib v Dato' James Wong* [1971] 1 MLJ 246 dan *Mohamed Jaafar v Sulaiman & Anor* [1970] 1 MLJ 18. Terdapat perbezaan pendapat tentang tahap pembuktian itu. Ada yang berkata seperti dalam kes sivil, ada pula yang berkata seperti dalam kes jenayah. Tetapi, dalam kes ini tidak ada tuduhan perbuatan rasuah, maka soal membuktikan seperti dalam kes jenayah tidaklah timbul.

Jadi soalnya, pertama, berjayakah pempetisyen membuktikan bahawa terdapat ketidakpatuhan peruntukan undang-undang bertulis berhubungan peruntukan mana-mana dengan pilihan raya?

And at p 563:

Berhubung dengan s 10 Akta Pilihanraya 1958 tersebut, saya berpuashati Pui Beng Jee telah mendaftar sebanyak dua kali, sekali atas nama Pui Beng Jee dan sekali atas nama Hassan bin Abdullah. Ini melanggar peruntukan s 10 itu. Tetapi, tidak ada bukti bahawa dia mengundi sekali, dua kali atau tidak langsung. Malah jika dia mengundi dua kali pun, perbuatannya seorang sahaja tidak menjejaskan keputusan pilihanraya itu, satu lagi syarat yang perlu dipenuhi di bawah s 32(b).

[27] The provisions of our s 32(b) EGA are very clear. We would reiterate that the onus is on the petitioner to prove to the satisfaction of the election judge that there is non-compliance with the provisions of any written law relating to election and that such non-compliance affects the result of the election.

[28] Learned counsel for the appellant in his submission earlier had urged this court to follow the interpretation given to s 32(b) in three cases namely:

(1) *Abd Hamed bin Mamat lwn Uz Baharuddin bin Mohd dan lain-lain* [1992] MLJU 83.

(2) *Re Tanjung Puteri State Election Petition* [1988] 2 MLJ 111.

(3) *Harris Mohd Salleh v Ismail bin Majin, Returning Officer Ismail bin Majin & Ors* [2001] 3 MLJ 433.

[29] These cases, in interpreting s 32(b) adopted the interpretation given to s 37(1) Representation of the People Act 1949 of England by Lord Denning in the case of *Morgan v Simpson* [1974] 3 All ER 722 which reads the section disjunctively, to wit 'the court can still declare the election void even if the irregularities do not affect the outcome of the election'.

[30] A comparison between our s 32(b) and s 37(1) of the English statute would reveal the stark difference between both sections, s 37(1) is worded as follows:

No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears

to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.

[31] That section is expressed in the negative. It says when an election is not to be declared invalid. However in *Morgan*'s case, Lord Denning MR thought that the section should be transformed so as to read positively as follows:

> A local government election *shall* be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local election rules) if it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act *or* omission *did* affect the result. (Emphasis added.)

[32] In comparison, our s 32(b) is already worded in the positive. It reads as follows:

> 32 The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge:
>
> (a) that …;
>
> (b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election.

[33] Our courts have consistently required that non-compliance must affect the result of the election by construing the provision as it is worded. The cases of *Re Election Petition of Cheah Seng Teik, Isahak Hamid v Mustapha, Mohamed Jaafar v Sulaiman and Tg Nawawi bin Tengku Abd Kadir @ T Putra v Lokman bin Muda & Ors* which we have mentioned earlier will attest to this.

[34] Again, in dealing with the interpretation of s 32(b), Abdul Hamid Mohamed J (as he then was) in *Ang Thye Chin v Chua Kow @ Chua Kow Eng & lain-lain* [1996] 1 CLJ 49 had this to say (at p 58):

> Adalah jelas selama 21 tahun semenjak peruntukan itu diwujudkan Hakim-Hakim Pilihan raya di negara kita sekata tentang maknanya walaupun jalan yang mereka lalui berlainan: ada yang tidak merujuk kepada mana-mana kes langsung, ada yang merujuk kepada kes di England yang diputuskan pada tahun 1875, dan ada pula yang merujuk kepada kes-kes dari India sahaja. Tetapi keputusan mereka serupa.
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> Cuma mulai tahun 1988 Wan Yahya H (pada masa itu) dalam kes *Tanjung Puteri Johor State Election Petition, Abdul Razak bin Ahmad v Dato' Md. Yunus bin Sulaiman & Anor* [1988] 2 MLJ 111 tiba-tiba mengikuti pandangan Lord Denning MR dalam kes *Morgan & Ors v Simpson & Anor* [1974] 3 All ER 722. Kes ini diikuti pula oleh Ahmad Fairuz H dalam kes *Abdul Hameed bin Mamat v Ustaz Baharuddin bin Mohd & Ors* [1993] *Mallal's Digest*.

Dalam membuat pilihan ini, pendekatan saya adalah mudah.

Pertama, tugas mahkamah bukan membuat undang-undang. Itu tugas Parlimen. Tugas mahkamah ialah memberi kesan kepada undang-undang yang dibuat oleh Parlimen sama ada ia bersetuju dengannya atau tidak.

Kedua, jika undang-undang yang dibuat oleh Parlimen itu jelas tidaklah perlu bagi mahkamah merayau ke negara-negara lain untuk mencari autoriti untuk mentafsirkan peruntukan itu.

Ketiga, jika telah terdapat penghakiman mahkamah di negara ini, apatah lagi jika semua sekata dan bagi tempoh yang lama pula, kita tidak harus meninggalkannya untuk menerima pakai satu tafsiran baru yang dibuat oleh Hakim-Hakim di negara lain dalam memutuskan kes-kes di negara itu mengikut undang-undang negara itu, dan keadaan atau amalan di negara itu.

And at p 60:

Dalam keadaan ini, saya lebih cenderung kepada mengikuti pandangan yang telah wujud begitu lama di negara kita daripada mengikuti pandangan Lord Denning MR itu. Undang-undang kita begitu jelas dan telah digubal dalam bentuk positif, maka ia tidak perlu lagi digubal semula daripada negatif kepada positif seperti yang dilakukan oleh Lord Denning MR kepada undang-undang di negaranya itu.

Jadi, kesimpulannya dalam penghakiman saya, di bawah s 32(b), pemilihan seseorang calon dalam sesuatu pilihan raya itu hendaklah diisytiharkan sebagai batal jika Hakim Pilihan raya berpuas hati bahawa kerana ketidakpatuhan peruntukan-peruntukan mana-mana undang-undang bertulis berhubungan dengan pilihan raya, pilihan raya itu telah tidak dijalankan mengikut prinsip-prinsip yang ditetapkan di dalam undang-undang bertulis dan bahawa ketidakpatuhan itu telah menyentuh keputusan pilihan raya itu.

[35] In *Home Luck Investments Sdn Bhd v Commissioner of Federal Capital of Kuala Lumpur* [1969] 1 MLJ 248, Raja Azlan Shah J (as His Highness then was) rejected the usage of English rating laws. His Lordship had this to say:

It is beyond doubt that the core of our laws has, broadly speaking, been derived from English laws but we must not forget that we have our own laws, our own economic and social life and our own peculiar problems which we have to solve. We must therefore be cautious not to depend for guidance too heavily and too uncritically on English insight and experience of the working of their rating law and the solution of their problems.

[36] In *Foo Loke Ying & Anor v Television Broadcast Ltd & Ors* [1985] 2 MLJ 35, the then Supreme Court speaking through that distinguished judge Abdoolcader SCJ (as he then was) stated that the court is not at liberty to treat words in a statute as mere tautology or surplus age unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

[37] Further, in *Chin Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69, the Federal Court stated that applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.

[38] Bearing in mind the above authorities, we must say with respect that Lord Denning's approach in the case of *Morgan v Simpson* cannot be applied here as our s 32(b) on which the appellant's petition is based is crystal clear in its language. To accept such an interpretation would defeat Parliament's intention in enacting s 32(b).

[39] Next, we need to ascertain the meaning of the phrase 'the result of the election' as provided in s 32(b).

[40] In *Isahak Hamid v Mustapha* Ismail Khan J (as he then was) held 'the result of the election' to mean the success of one candidate over the other. This is what his Lordship said (at p 21):

> I also hold that the non-compliance of the law by the returning officer had not affected the result of such election, that is, *the success of one candidate over the other.* (Emphasis added.)

[41] In para 581, *Halsbury's Laws of England* Vol 15, the word 'result' is explained to mean 'the success of one candidate over another and not merely an alteration in the number of votes given to each candidate.'

[42] Since the EP was grounded on s 32(b) the petitioner must prove to the satisfaction of the election judge that the non-compliance has affected the result of the said election, namely the election of the third respondent with a majority of 2,728 votes.

[43] We do agree with the submission of learned counsel for the appellant that due emphasis should be given to the overriding principles of democracy and the need to protect the purity of the election process but at the same time we cannot ignore the elementary rule of construction that where the meaning of the words in a statute is plain and unambiguous, as in this case, the court is left with no choice but to give effect to its plain meaning. It is not for us judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning.

[44] We shall now move on to the factual issue. During the trial before the election judge, the following facts were not in dispute:

(a) There had been non-compliance of reg 11(5) and Form 8 because the polling hours were extended from 5pm to 7pm;

(b) There had been non-compliance of reg 14A because on nomination day, the appellant was supplied with electoral rolls dated 5 March 2004, whereas on polling day the electoral rolls

used were dated 15 March 2004 for Taman Greenwood and 16 March 2004 for Taman Sri Gombak.

[45] In his effort to prove that the non-compliance of reg 11(5) and Form 8, ie the extension of polling hours from 5pm to 7pm has affected the result of the said election, the appellant had in para 4.1 of his EP, listed 87 names of persons to whom ballot papers had been issued after 5pm on 21 March 2004. However, none of the 87 persons listed in the EP had been called to give evidence confirming that they had been issued with ballot papers after 5pm.

[46] Even assuming that they had been issued with ballot papers and their votes were deducted from the majority, the third respondent would still have won the election with a winning majority of 2,641 votes [2,728 - 87 = 2,641]. In any case, the figures given by the witnesses for the appellant were mere estimates and none of the witnesses could verify the figure showing how many voters came to vote after 5pm.

[47] Further, in his judgment appearing at pp 49–51 of the appeal record the learned election judge had also made a finding of fact that the maximum figure of 314 provided by the appellant's witnesses by itself could not have affected the result of the election as the third respondent would still have won with a majority of 2,414 votes [2,728 - 314 = 2,414].

[48] Next, in trying to prove that the non-compliance of reg 14A had affected the result of the election, the appellant in para 4.2 of the EP pleaded that he was on nomination day given the electoral rolls dated 5 March 2004 but the electoral rolls used on polling day were dated 15 March 2005 and 16 March 2004. The existence of different electoral rolls only involved two polling stations, namely Taman Greenwood and Taman Sri Gombak.

[49] Under item (d) of para 4.2 of the EP which appears at p 191 of Volume 1 of the appeal record, the appellant also alleged that the existence of different electoral rolls had given the opportunity to voters to vote twice, and the appellant had listed three names.

[50] From the three names listed in the EP, only Mansor bin Ishak was called to give evidence. According to his evidence this witness said that although he had the opportunity to vote twice, he nevertheless voted only once. Even if he had voted twice (which is an offence) it is our view that this could not have affected the result of the election.

[51] On record, there is no evidence at all to prove the allegation that a voter had voted twice. It therefore remains a presumption. Even if a voter had voted twice, there is no evidence to suggest that he had voted for the third respondent. It would be wrong, therefore, to assume that the third respondent had won because of these votes.

[52] The learned election judge in his judgment at pp 52–53 of the appeal record also made a finding of fact that although there were allegations of double voting by SP13 and SP16 due to the existence of different electoral rolls, these allegations nevertheless remained allegations as there was no evidence to support them. In any case the learned judge found that even if the allegations were taken into consideration, there was still no evidence to show that the problem was so widespread as to have affected the result of the election.

[53] Although the respondents did not dispute that there were non-compliance with regs 11(5), 14A and Form 8 the appellant is still required to prove that the non-compliance have affected the result of the election. From the evidence adduced before the election court we find that the appellant had failed to do so.

[54] At the risk of repetition, we would once again say that all the cases we have cited above appear to suggest that the appellant needs to prove not only non-compliance but also that the non-compliance have affected the result of the election. This same view was echoed by this court in *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729. However, learned counsel for the appellant in his submission, expressed the view that the Federal Court in *Gan Joon Zin* did not fully discuss the issue involving s 32(b). He was therefore of the view that the observation made by the court that it was necessary to prove that the non-compliance have affected the result of the election, was a mere obiter and this court is not obliged to follow that decision following the doctrine of stare decisis.

[55] We feel a brief background facts in *Gan Joon Zin* is necessary in order to put the matter in its proper perspective. This was the first case that has come to the Federal Court by way of an appeal since the amendment to the EOA 1954.

[56] The appeal is against the decision of the election judge striking out the EP on a preliminary objection. In the EP, the appellant was seeking for a declaration that the election was void or that the first respondent was not duly elected or ought not to have been returned based on five grounds. One of the grounds is that the first respondent carried out election campaign in contravention of ss 24B(1), (4), (6), (7), and (10) and s 32 (b) and (c) of the Act.

[57] The second and third respondents raised preliminary objections on three grounds one of which is that the EP does not satisfy the mandatory requirements of reg 4(1)(b) of the said Rules read with s 32(b) of the Act as the EP lacked facts and grounds alleging that the non-compliance of written law relating to the conduct of elections had affected the result of the election.

[58] After hearing submissions on the preliminary objections, the learned judge held that the said EP was defective as the mandatory requirements were not met. As such the EP was struck out with costs.

[59] At the hearing of the appeal before the Federal Court the respondents raised yet another preliminary objection that the appellant had 'no *locus standi*'

to maintain the appeal. At the close of submissions by parties on the preliminary objection, the same was upheld by the court. However, since full arguments were also heard on the appeal, the court proceeded to deal with the appeal proper.

[60] Having heard arguments on the appeal, the Federal Court agreed with the decision of the learned election judge and had this to say (at p 745) with regard to the provision of s 32(b):

> The learned judge referred to a number of authorities to support his view. We do not think that we have to discuss them. It is sufficient merely to say that s 32(b) is too clear for anyone to have any doubt that the election of a candidate may only be declared to be void on any one of the grounds provided therein. To *avoid the election on ground (b) ie of non-compliance with the relevant law, it must be proved that there was not only non-compliance but also that such non-compliance had affected the result of the election.* (Emphasis added.)

[61] In our view, the above observation reflects the correct statement of the law on the construction of s 32(b). That being the case, there is no reason for us to depart from the view expressed by the Federal Court in *Gan Joon Zin*.

[62] Having said that and based on the foregoing reasons and the authorities quoted above it is our unanimous decision that this appeal should be dismissed with costs. We would also order that the deposit be paid out to the respondents to account for their taxed costs and confirm the orders of the learned judge.

[63] My learned brothers Steve Shim Lip Keong CJ (Sabah & Sarawak) and Pajan Singh Gill FCJ have seen this judgment in draft and expressed their agreement with it.

Appeal dismissed with costs.

Reported by Loo Lai Mee